

Appendix 12A to Consent Decree entered in United States of America and State of New Mexico v. The Burlington Northern & Santa Fe Railway Company, C.A. No. 02-2000-0001, D.N.M.

Notice: This is a Model Easement that has been adapted for use in connection with the referenced Consent Decree for the AT&SF Albuquerque Superfund Site, Albuquerque, Bernalillo County, New Mexico. Actual facts and circumstances involved in the conveyance of the property interest may necessitate some changes in the final instrument that is executed and recorded, as appropriate.

**ENVIRONMENTAL PROTECTION EASEMENT  
AND  
DECLARATION OF RESTRICTIVE COVENANTS**

1. This Environmental Protection Easement and Declaration of Restrictive Covenants is made this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and among The Burlington Northern and Santa Fe Railway Company ("Grantor"), having an address of 2650 Lou Menk Drive, 2nd. Floor, Fort Worth, Texas 76131, and the United States of America ("United States") and its assigns, and the State of New Mexico ("State") and its assigns, "Grantees", having addresses of U.S. Environmental Protection Agency, Region 6, 1445 Ross Ave., Ste. 1200, Dallas, Texas 75202, and New Mexico Environment Department ("NMED"), Harold Runnels Building, 1190 St. Francis Drive, Santa Fe, New Mexico 87505, respectively.

**WITNESSETH:**

2. WHEREAS, Grantor is the owner of a parcel of land located in the County of Bernalillo, State of New Mexico, more particularly described on **Exhibit A** attached hereto and made a part hereof (the "Property"); and

3. WHEREAS, the Property is part of the AT&SF Albuquerque Superfund Site ("Site"), which the U.S. Environmental Protection Agency ("EPA"), pursuant to Section 105 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9605, placed on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on December 16, 1994; and

4. WHEREAS, in a Record of Decision dated June 27, 2002 (the "ROD"), the EPA Region 6 Superfund Division Director selected a "remedial action" for the Site, which provides, in part, for the following actions: Development of a Remedial Design and Implementation of Remedial Action, including operation and maintenance. These actions will involve the excavation, treatment, and disposal of contaminated surface and subsurface soils and sludge, including hazardous substances and hazardous soil and debris, as well as removal, treatment, and disposal of contaminated ground water containing hazardous substances and pollutants and

contaminants (including both free phase and non-aqueous phase liquids), as more particularly described in the ROD.

and

5. WHEREAS, the parties hereto have agreed pursuant to the Consent Decree referenced below: 1) to grant a right of access over the Property to the Grantees for purposes of implementing, facilitating and monitoring the remedial action; and 2) to impose on the Property use restrictions as covenants that will run with the land for the purpose of protecting human health and the environment; and

6. WHEREAS, Grantor wishes to cooperate fully with the Grantees in the implementation of all response actions at the Site;

NOW, THEREFORE:

7. Grant: Grantor, on behalf of itself, its successors and assigns, in consideration of the terms of the Consent Decree in the case of *United States of America and State of New Mexico v. The Burlington Northern & Santa Fe Railway Company*, C.A. No.[Insert Case No.], D.N.M. (“Consent Decree”) attached hereto as **Exhibit B**, does hereby covenant and declare that the Property shall be subject to the restrictions on use set forth below, and does give, grant and convey to the Grantees, and their assigns, with general warranties of title, 1) the right to enforce such use restrictions, and 2) an environmental protection easement of the nature and character, and for the purposes hereinafter set forth, with respect to the Property.

8. Purpose: It is the purpose of this instrument to convey to the Grantees real property rights, which will run with the land, to facilitate the remediation of past environmental contamination and to protect human health and the environment by reducing the risk of exposure to contaminants, while reserving to Grantor rights and privileges in and to the use of the Property not incompatible with the restrictions, rights, and easements granted herein.

9. Restrictions on use: The following covenants, conditions, and restrictions apply to the use of the Property, run with the land and are binding on the Grantor, its successors and assigns:

a) Any use or development of ground water on or underlying the Property is prohibited, except that such ground water may be used and developed in accordance with plans approved by Grantees under the Consent Decree for the limited purposes of remedial activities such as treating and monitoring groundwater or hydraulic gradient pumping, or for revegetating the Property with other than agricultural gardens or crops.

c) The Property shall not be used, or contain any facilities, for any agricultural purposes. There shall be no grazing, watering, or other presence of livestock upon the Property, except in the process of railroad shipment with controlled access in strict compliance with the Railroad use provisions of this instrument. There shall be no agricultural gardens or crops grown upon the Property.

d) The Property shall have restricted access and shall comply with the security requirements set forth in 40 C.F.R. 264.12 (July 1, 2003 Ed.).

e) The Property shall not be used, or contain any facilities, for food preparation, sale, or consumption, including any restaurant, kitchen, food market, or the like.

f) Any industrial or commercial use or development of the Property that would threaten or damage any Site remedial component, such as fencing, cap, covers, berms, monitor or extraction wells or pumps, waste storage or treatment vessels or devices, is prohibited.

g) Redevelopment of any portion of the Property may only commence in compliance with the Statement of Work attached to the Consent Decree and only after EPA has provided written approval verifying in writing that Site Remediation Goals have been met for the medium or media that will potentially be affected by the proposed redevelopment. The Property may be redeveloped for railroad use, provided that EPA determines in writing prior to the commencement of any such redevelopment that such use will not interfere with or adversely affect the implementation, integrity or protectiveness of the remedial measures to be performed pursuant to the Consent Decree. Approval for railroad use shall not be construed to permit any use otherwise prohibited herein.

10. Limitation of restrictions: The above restrictions may be limited, or terminated in whole or in part, in writing, by the Grantees. If requested by the Grantor, such writing will be executed by Grantees in recordable form.

11. Environmental Protection Easement: Grantor hereby grants to the Grantees an irrevocable, and continuing right of access, ingress, and egress at all reasonable times to the Property for the purposes of conducting any activity related to and consistent with the Consent Decree, regardless of whether all requirements of the Consent Decree have been performed, including, but not limited to the following activities:

a) Monitoring the Work as defined in Paragraph 4 of the Consent Decree;

- b) Verifying any data or information submitted to the United States or the State;
- c) Conducting investigations relating to contamination at or near the Site;
- d) Obtaining samples;
- e) Assessing the need for, planning, or implementing additional response actions at or near the Site;
- f) Assessing implementation of quality assurance and quality control practices as defined in the approved Quality Assurance Project Plans;
- g) Implementing the Work pursuant to the conditions set forth in Paragraph 88 of the Consent Decree;
- h) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by the Consent Decree Settling Defendant or its agents, consistent with Section XXIV (Access to Information) of the Consent Decree;
- i) Assessing Settling Defendant's compliance with this Consent Decree;
- j) Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to the Consent Decree;
- k) Conducting periodic reviews of the remedial action, including but not limited to, reviews required by applicable statutes and/or regulations; and
- l) Implementing any response action or taking or directing appropriate action that may be required pursuant to Paragraphs 18, 52, 53 and 94 of the Consent Decree.

In exercising this right of access, ingress, and egress on the portion of the Property which is on the active railroad right-of-way, Grantee will use reasonable efforts to minimize interference with rail traffic.

12. Reserved rights of Grantor: Grantor hereby reserves unto itself, its successors, and assigns, all rights and privileges in and to the use of the Property which are not incompatible with the restrictions, rights and easements granted herein.

13. EPA and State Entry, Access, and Response Authority: Nothing in this document shall limit or otherwise affect EPA's rights of entry and access or EPA's authority to take

response actions under CERCLA, the NCP, or other federal law. Nothing in this document shall limit or otherwise affect the State's right of entry and access or the State's authority to take response actions under State law.

14. No Public Access and Use: No right of access or use by the general public to any portion of the Property is conveyed by this instrument.

15. Notice requirement: Grantor agrees to include in any future instrument conveying any interest in any portion of the Property, including but not limited to deeds, leases and mortgages, a notice which is in substantially the following form:

**NOTICE: THE INTEREST CONVEYED HEREBY IS  
SUBJECT TO AN ENVIRONMENTAL PROTECTION  
EASEMENT AND DECLARATION OF RESTRICTIVE  
COVENANTS, DATED \_\_\_\_\_, 20\_\_, RECORDED IN  
THE PUBLIC LAND RECORDS ON \_\_\_\_\_, 20\_\_,  
IN BOOK \_\_\_\_\_, PAGE \_\_\_\_\_, IN FAVOR OF, AND  
ENFORCEABLE BY, THE UNITED STATES OF AMERICA  
AND THE STATE OF NEW MEXICO.**

Within thirty (30) days of the date any such instrument of conveyance is executed, Grantor must provide Grantees with a certified true copy of such instrument and, if it has been recorded in the public land records, its recording reference.

16. Administrative jurisdiction: The federal agency having administrative jurisdiction over the interests acquired by the United States by this instrument is the EPA. The State agency having administrative jurisdiction over the interests acquired by the State is NMED.

17. Enforcement: The Grantees shall be entitled, individually or jointly, to enforce the terms of this instrument by resort to specific performance or legal process. All remedies available hereunder shall be in addition to any and all other remedies at law or in equity, including CERCLA. Enforcement of the terms of this instrument shall be at the discretion of the Grantees, and any forbearance, delay or omission to exercise their rights under this instrument in the event of a breach of any term of this instrument shall not be deemed to be a waiver by the Grantees of such term or of any subsequent breach of the same or any other term, or of any of the rights of the Grantees under this instrument.

18. Covenants: Grantor hereby covenants to and with the United States and its assigns, and the State and its assigns, that the Grantor is lawfully seized in fee simple of the Property, that the Grantor has a good and lawful right and power to sell and convey it or any interest therein, that the Property is free and clear of encumbrances, except those noted on

**Exhibit C** attached hereto, and that the Grantor will forever warrant and defend the title thereto and the quiet possession thereof.

19. **Notices:** Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and shall either be served personally or sent by first class mail, postage prepaid, addressed as follows:

**To Grantor:**

Director, Environmental Remediation  
The Burlington Northern and Santa Fe  
Railway Company  
920 SE Quincy  
P.O. Box 1738  
Topeka, Kansas 66601-1738

Vice President and General Counsel, Law  
The Burlington Northern and Santa Fe  
Railway Company  
2500 Lou Menk Dr., AOB 3<sup>rd</sup> Floor  
Ft. Worth, Texas 76131

Supervising Contractor for Albuquerque Tie Plant  
TRC Environmental Consultants  
2313 W. Sam Houston Parkway N, Suite 107  
Houston, Texas 77043

**To Grantees:**

**To the United States:**

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC  
Re: DJ # 90-11-2-07889

Director, Superfund Division  
U.S. Environmental Protection Agency  
Region 6

e) Successors: The covenants, terms, conditions, and restrictions of this instrument shall be binding upon, and inure to the benefit of, the parties hereto and their respective personal representatives, heirs, successors, and assigns and shall continue as a servitude running in perpetuity with the Property. The term "Grantor", wherever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantor" and their personal representatives, heirs, successors, and assigns. The term "Grantees", wherever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantees" and their personal representatives, heirs, successors, and assigns. The rights of the Grantees and Grantor under this instrument are freely assignable, subject to the notice provisions hereof. The rights of a Grantee may be assigned only to a governmental entity with authority to assume the rights and obligations of that Grantee under the Consent Decree.

Agreement Not to Contain Debris Entered in United States of America and State of New Mexico v. The Burlington Northern & Santa Fe Railway Company, C.A. No. 03-10001, D. N.M.

f) Termination of Rights and Obligations: A party's rights and obligations under this instrument terminate upon transfer of the party's interest in the Easement or Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

g) Captions: The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction or interpretation.

h) Counterparts: The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

21. State Consent to Transfer of Interest: The State hereby consents and agrees to accept a conveyance of the property interest of the United States herein following completion of remedial action at the Site.

22. Duration: Property interests granted by this instrument will be terminated, in whole or in part, if and when the Grantees determine that they are no longer necessary to accomplish the purposes for which the instrument was created.

IN WITNESS WHEREOF, Grantor has caused this Agreement to be signed in its name.

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY

By: \_\_\_\_\_

STATE OF NEW MEXICO           )  
  ) ss  
COUNTY OF BERNALILLO       )

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me, the undersigned, a Notary Public in and for the State of New Mexico, duly commissioned and sworn, personally appeared \_\_\_\_\_, known to be the \_\_\_\_\_ of \_\_\_\_\_, the



corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute said instrument.

Witness my hand and official seal hereto affixed the day and year written above.

\_\_\_\_\_  
Notary Public in and for the  
State of New Mexico  
My Commission Expires: \_\_\_\_\_.

This easement is accepted this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

UNITED STATES OF AMERICA  
U.S. ENVIRONMENTAL PROTECTION  
AGENCY

By: \_\_\_\_\_  
\_\_\_\_\_

This easement is accepted this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

STATE OF NEW MEXICO  
NEW MEXICO ENVIRONMENT  
DEPARTMENT

By: \_\_\_\_\_  
\_\_\_\_\_

Attachments:	Exhibit A	-	legal description of the Property
	Exhibit B	-	Consent Decree
	Exhibit C	-	list of permitted title encumbrances